IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1192

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

BARBARA J. SYSKA, individually and as guardian of A. MIESZKO SYSKI and BOGUMIL SYSKI

Appellant

v.

MONTGOMERY COUNTY, MARYLAND, BOARD OF EDUCATION

and

SECRETARY OF HEALTH AND MENTAL HYGIENE, STATE OF MARYLAND

Appellees

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

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January 8, 1981

QUESTION PRESENTED

Whether Maryland Code, Education Article, §7-402, and its implementing regulations, are violative of the Religion Clauses of the First Amendment of the Constitution of the United States when applied to exempt children from a compulsory school vaccination program solely on the basis of religious tenets and practice; whether the program so established denies appellant equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States; and whether the program violates the constitutionally protected right to privacy.

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Appellant

v.

MONTGOMERY COUNTY, MARYLAND, BOARD OF EDUCATION, et al

Appellees

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

Barbara J. Syska, the appellant, appeals from the final judgment of the Court of Appeals of Maryland, dated October 10, 1980, denying certiorari following decision by the Maryland Court of Special Appeals affirming a trial court's determination that a Maryland statute and implementing regulations which establish an exemption from a compulsory school vaccination program based on religious beliefs, are not repugnant to the United States Constitution either facially or in their application.

OPINIONS BELOW

The opinion of the Maryland Court of

Special Appeals, which appears in the appendix hereto, pp. Apx-1, *infra*, is reported at 45 Md.App. 626, 415 A.2d 301 (1980).

The findings of fact and application of law to the bill of complaint are not reported. They are reprinted in the appendix hereto, pp. Apx-11, *infra*.

Denial of petition for writ of certiorari by the Maryland Court of Appeals is likewise unreported, but a copy of the Order is included in the appendix hereto.

JURISDICTION

The Order of the Court of Appeals of Maryland denying certiorari was entered on October 10, 1980. See p. Apx-26.

Notice of appeal from the final judgment of the Court of Appeals of Maryland was filed in that Court within 90 days from entry. See pp. Apx-24, 25.

This appeal is being docketed in this Court within 90 days from the denial of certiorari by the Court of Appeals of Maryland. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

QUESTION PRESENTED

Whether Maryland Code, Education Article, §7-402, and its implementing regulations, are violative of the Religion Clauses of the First Amendment of the Constitution of the United States when applied to exempt children from a compulsory school vaccination program solely on the basis of religious tenets and practice; whether the program so established denies appellant equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States; and whether the program violates the constitutionally protected right to privacy.

THE STATUTE INVOLVED, IMPLEMENTING REGULATION AND CONSTITUTIONAL PROVISION

Maryland Code, Education Article, §7-402

Immunizations. (a)... (1) In cooperation with the State Board and Medical and Chirurgical Faculty of Maryland, the Department of Health and Mental Hygiene shall adopt rules and regulations regarding the immunizations required of children entering schools.

(2)...

(b) Exception. Unless the Secretary of Health and Mental Hygiene declares an emergency or an epidemic of disease, a child whose parent or guardian objects in writing to immunization on the ground that it conflicts with the tenets and practice of a recognized church or religious denomination of which he is an ad-

herent or member may not be required to present a physician's certification of immunization to be admitted to school.

Code of Maryland Regulations (COMAR), Title 10 (Department of Health and Mental Hygiene), Subtitle 06 (Diseases), Chapter 04 (Required Immunizations Before Entry into a Maryland School)

03. Religious Conflict. Any parent or guardian who presents a written statement of objection to immunizations upon the grounds that they conflict with the tenets or practices of a recognized church or religious denomination of which he is a member may not be required to present a physician's certificate of immunization. This exception will not apply in case of an emergency or epidemic of disease which is declared by the Secretary of Health and Mental Hygiene.

First Amendment, United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;...

Ninth Amendment, United States Constitution

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Fourteenth Amendment, United States Constitution.

...No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

HOW THE FEDERAL QUESTION WAS PRESENTED

The appellant raised the question that the Maryland statute and regulations "... adopted Constitutionally impermissible classifications by prefering certain religions over other religions so that the plaintiff is denied equal protection under the law" in her initial Bill of Complaint filed as the initial pleading in the trial court. She further raised the question as to invasion of privacy of a constitutional dimension in the same initial pleading. The appellant argued the federal question in preliminary stages, during trial, on direct appeal, and in her petition to the Court of Appeals of Maryland for a writ of certiorari.

STATEMENT OF THE CASE

The appellant is a native of Poland. She lived through Nazi and Communist occupations and developed a deep and abiding moral sense that medical experimentation is evil and that parents should have the respected obligation to decide about the health and welfare of their children--an obligation not to be usurped by the state without an opportunity for the parents to have informed consent to procedures, or in the face of a clear and present danger to the public welfare.

In furtherance of her belief that she should be the primary decider of the best interests of her children, she permitted some of her children to be innoculated from time to time. However, as she learned more about vaccines and the effects that sometimes accompany vaccination, she believed it best that her children receive no further vaccinations. In January, 1979, however, the Maryland Department of Health and Mental Hygiene and the Montgomery County Board of Education, among others, determined that the prior lax enforcement of vaccination requirements should be turned around, and that a compulsory program should be enforced for children to be admitted or readmitted to school in January 1979.

Appellant's son, Mieszko Syski*, did not have proof of having received the innoculations required, specifically for rubella, and he was denied admittance to the Kemp Mill Elementary School in Montgomery County, Maryland. Appellant filed suit in the Circuit Court for Montgomery County seeking a declaration that the statute and regulations were unconstitutional as applied to Mieszko, and an injunction to prevent Mieszko from being kept from school.

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*Syska is the feminine form of the family name; Syski is the masculine form.

Appellant's older son, Bogumil Syski, was at first missed in the innoculation screening at Good Counsel High School in Montgomery County, Maryland, but when in April he was asked to provide evidence of vaccination against rubeola, he was unable to do so, and was also barred from continued attendance.

The case came on for trial and evidence as to the efficacy of the vaccination program was admitted over appellant's objection. Appellant believed--and does still believe--that the medical testimony serves only to obscure the constitutional question. In any event, the trial court first denied an interlocutory injunction that would have permitted the children to attend school during the pendency of the litigation, and later found that the medical innoculation program was effective, in the public interest, and that there was no constitutional deprivation to the appellant and her children. The findings of fact and conclusions of the trial judge are in the Appendix hereto.

At trial, the appellant stated that she held a deep moral conviction that was elevated to the status of a religion and that she was denied the free exercise of such religious conviction by the application of the statute and regulation. She also

challenged the statute and regulation as preferring religions which have certain tenets and practices over other religions which do not have such tenets and practices.

The appellees argued that the statute had a secular purpose, that no religion was advanced or inhibited by the primary effect of the statute, and that there was no excessive entanglement of religion fostered by the statute.

The appellant also argued that it was an invasion of her privacy as a parent for the state to interfere in the business of her rearing her children, and that it was an invasion of her children's right to privacy to force them to be vaccinated when no clear and present danger existed that it was necessary in the public welfare for the children to be innoculated.

After the Bill was dismissed, appellant filed a timely direct appeal, and the trial court was affirmed by the Maryland Court of Special Appeals in a reported opinion which is reprinted in the Appendix hereto.

Appellant then sought review by certiorari from the highest state court, and now appeals the denial of certiorari.

THE QUESTION IS SUBSTANTIAL

The question as to the First Amendment implications of a state program which provides exemption from an otherwise compulsory vaccination program solely on religious grounds has not been directly considered by this Court.

It is true that as long ago as 1905 in the case of *Jacobson v. Massachusetts*, *197 US 11 (1905)* the Court upheld the police power of a state to require innoculations generally when a disease of epidemic proportions was ravaging a community, but since claims based upon religious conscience were not argued to the Supreme Court in that case, it still must be deemed an open question whether vaccination can be imposed on an individual over his objections based on conscience, or on the objections of a parent or guardian based on conscience on behalf of a minor child. See ANTIPAU, MODERN CONSTITUTIONAL LAW, §1:33.

It is also true that this Court has indicated that it would hold, although not so holding, that freedom of religion will have to bow before society's interest in preserving public health, at least so long as an epidemic would prevail and there is no proof that the vaccination would result in the death of the recipient. *Prince v.*

Massachusetts, 321 US 158 (1944).

The statute here, in its exceptions provision, does not meet the three-tier scheme described frequently by this Court because the exception does not reflect any clearly secular purpose at all; the effect of the exception does have a primary effect which advances some and inhibits other religions; and there is a potential for excessive entanglement of religion and government if the simple question is raised as to whether or not a certain religion would qualify for the exception. The state has placed itself in a situation where it must be the arbiter of questions arising as to who may claim an exception on religious grounds.

As the Second Circuit Court of Appeals stated recently in *Brandon v. Board of Education of Guilderland Central School District*, ___ F.2d ___, 49 LW 2354 (2d Cir. 11/17/80) in the context of permitting prayer meetings on public school property, to an impressionable student, even the mere appearance of secular involvement in religion might indicate that the state has placed its imprimatur on a particular religious tenet or practice. This symbolic interference was said by the Court to be too dangerous to permit.

This Court has determined in the context of the Universal Military Service and Training Act that an individual can claim a conscientious objection to the draft based on a non-theist faith provided the individual had "...sincere religious beliefs which [are] based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent." *United States v. Seeger, 380 US 163 (1965), at 176.*

Going beyond that, this Court in *Welch v. United States, 398 US 333 (1970)* favored a conscientious objector despite his assertion of only "moral" opposition to war.

> The constitutional question that must be faced in this case is whether a statute that defers to the individual's conscience only when his views emanate from adherence to theistic religious beliefs is within the power of Congress. Congress...having chosen to exempt...cannot draw a line between theistic and nontheistic religious beliefs on the one hand and secular beliefs on the other. Any such distinctions are not, in my view, compatible with the Establishment Clause of the First Amendment." *398 US at 356 (Harlan, J., concurring).*

As in the conscientious objector cases, the public interest is served where the objection or exception is not allowed, but where a legislature has chosen to make ex-

emptions, then the basis must not exclude non-religious moral convictions which are deeply held and not transitory.

If a state allows no exemptions, then the religious question cannot be raised. If a state allows exemptions based on moral objections that may or may not be rooted in religion, then the religious question cannot be raised. But, when a state specifically grounds exemptions on religious tenets and practices, as Maryland and some other states do, then the statute cannot stand in the face of the First Amendment, and is repugnant thereto.

CONCLUSION

For the above reasons, this Court should note probable jurisdiction of this appeal, should note the substantial nature of the question presented, and should order filing of briefs and set the case for oral argument.

Respectfully submitted,

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January 8, 1981

BARBARA J. SYSKA, INDIVIDUALLY, ETC. *V.* MONTGOMERY COUNTY BOARD OF EDUCATION ET AL.

[No. 1023, September Term, 1979.]

Decided June 10, 1980.

CONSTITUTIONAL LAW — STATUTES — *Compulsory Immunization Program — Constitutionality Of — Claimed As Being Violative Of Religious Clauses Of First Amendment, Equal Protection And Right To Privacy Under Federal Constitution Even Though Refusal To Comply Was Grounded Upon Personal Belief And Fears — Since Objections To Immunizations Were Not Rooted In Religious Beliefs But Merely Based Upon Personal And Subjective Evaluations Of Benefits To Be Derived, Secular Considerations, Philosophical And Personal Rather Than Religious Beliefs Held Insufficient To Rise To Demands Of Religious Clauses Of First Amendment — Statute Held Constitutional — § 7-402 Of The Education Article.*

pp. 631-633

H. E. F.

Appeal from the Circuit Court for Montgomery County (FAIRBANKS, J.).

Suit instituted by Barbara J. Syska, individually and as guardian of A. Mieszko Syska and Bogumil A. Syska against Montgomery County Board of Education and Secretary of Department of Health and Mental Hygiene, State of Maryland, seeking to declare the compulsory immunization program unconstitutional. From a judgment finding the program constitutional, complainant appeals.

Judgment affirmed; appellant to pay the costs.

The cause was argued before THOMPSON, MELVIN and MACDANIEL, JJ.

James G. Kolb for appellant.

Stephen J. Sfekas, Assistant Attorney General, with whom were *Stephen H. Sachs, Attorney General,* and *Robert S. Bourbon* on the brief, for appellees.

MELVIN, J., delivered the opinion of the Court.

The appellant, Barbara J. Syska, is the mother of two children (Mieszko and Bogumil, ages 8 and 15, respectively, at the time of the trial below) who, in 1979, were denied admission to two Maryland schools, one private and one public, in Montgomery County. The reasons Mieszko was denied admission was because he could not furnish evidence that he had been immunized against rubella (German measles). The reason Bogumil was denied admission was because he could not furnish evidence that he had been immunized against rubeola (measles).

The appellant refused to have the children innoculated. Instead, she filed a bill of complaint in the Circuit Court for Montgomery County seeking a declaration that the Maryland statute and regulations passed pursuant thereto requiring immunizations as a pre-condition to admission to school violate rights guaranteed her by the First and Fourteenth Amendments to the Constitution of the United States and by Article 36 of the Maryland Declaration of Rights. The court below (Fairbanks, J.) declared that the

questioned statute and regulations did not violate either the Federal Constitution or the Maryland Declaration of Rights and dismissed the bill of complaint. We shall affirm.

I

The statute under attack was enacted by Chapter 315, Acts 1972, formerly codified as Article 77, § 84 (Ann. Code, 1957) and now, with style changes only, as § 7-402 of the Education Article (Ann. Code, 1978). It provides as follows:

> "§ 7-402. Immunizations.
>
> (a) *Rules and regulations.* — (1) In cooperation with the State Board and the Medical and Chirurgical Faculty of Maryland, the Department of Health and Mental Hygiene shall adopt rules and regulations regarding the immunizations required of children entering schools.
>
> (2) These rules and regulations shall:
>
> (i) Be adopted in compliance with the Administrative Procedure Act; and
>
> (ii) Provide that any child may have the immunization administered by his personal physician.
>
> (b) *Exception.* — Unless the Secretary of Health and Mental Hygiene declares an emergency or an epidemic of disease, a child whose parent or guardian objects in writing to immunization on the ground that it conflicts with the tenets and practice of a recognized church or religious denomination of which he is an adherent or member may not be required to present a physician's certification of immunization to be admitted to school. (An. Code 1957, art. 77, § 84; 1978, ch. 22, § 2.)"

Pursuant to the statute, the Department of Health and Mental Hygiene adopted the following regulations:

"Title 10

DEPARTMENT OF HEALTH AND MENTAL HYGIENE

Subtitle 06 DISEASES

Chapter 04 Required Immunizations Before Entry into a Maryland School

Authority: Article 77, § 84, Annotated Code of Maryland

.01 General.

A school principal or other person in charge of a school may not knowingly admit a pupil to, or retain a pupil in, a nursery or kindergarten through the sixth grade of school, who has not furnished evidence of primary immunizations against diphtheria, tetanus, pertussis, poliomyelitis, *measles (rubeola),* and *rubella* (German measles). In addition, children in the *seventh through twelfth* grades shall furnish proof of immunity against *measles (rubeola).* Proof of immunizations will be provided in a manner approved by the local deputy State health office. The immunization will be in accordance with the current schedule of immunizations recommended by the Maryland Steering Committee on Immunization Practices of the Medical and Chirurgical Faculty of Maryland. An exception may be made for a period of 90 days in the case of a child whose parent or guardian indicates that his child is in the process of complying with these regulations and furnishes evidence of further compliance after the start of the school term or within a reasonable length of time that is consistent with the current schedule of immunizations. (Emphasis added).

.02 Medical Contraindications.

These regulations may not apply to any pupil who presents a written statement from a licensed physician or a local deputy State health officer indicating that immunization against any or all of the above mentioned diseases is considered medically contraindicated, detrimental to, or not in the best interest of the child's health. The statement shall indicate whether the contraindication is permanent or temporary. If temporary, the statement shall provide assurance that the child will receive the immunizations and furnish evidence of their completion."

II

The appellant's quarrel with the statute and regulations is solely with the religious exemption clauses. She concedes that the State has the right under the police power, without offending constitutional proscriptions, to require immunization for the protection of the public health and safety. *See Jacobson v. Massachusetts*, 197 U.S. 11 (1905). She also seems to concede in her brief that it is constitutionally permissible "to grant an exemption on the basis of a recognized religion . . . [because it] may permit immunization of as many children as possible without intruding upon earnestly held religious beliefs. . . ." She also concedes that her own objection to innoculation for her children is *not* on the ground that it conflicts with the tenets and practices of a recognized church or religious denomination of which she is "an adherent or member [1]," and she presented no statement from a licensed physician or a local health officer that immunization of either of her children "is considered medically contraindicated, detrimental to, or not in the best interest of the child's health." (See Regulation § .02).

Appellant's counsel concedes that she was "unable at trial to fully articulate the depths of her beliefs of vaccination."

1. Appellant is a member of the Catholic Church.

It is clear, however, that she holds no belief that vaccination *per se* is immoral or unethical, for she concedes that in 1972 she had her younger son, Mieszko, vaccinated for rubeola (measles) prior to his entry to nursery school so she could "go out and work." Her objection now seems to be based on the compulsory nature of the immunization program. She testified that it "was up to me to decide," not the State, whether to have her children vaccinated; that she "know[s] what is best for my child"; that "whenever there is any medical procedure or medical experiments, I have to choose what is best for my child"; and that she had decided that "it [is] not good for him [Mieszko]" and "not in his best interest [Bogumil]" to be vaccinated. She made that decision because of her belief that the "vaccine is much more dangerous" and that the possible "bad effects" from vaccination outweigh the benefits that would accrue to her children if they were to be vaccinated. She said she did not want her child "to be a guinea pig."

In her brief, appellant equates her beliefs and fears concerning compulsory immunization to "deeply held moral convictions" or "deep seated grounds." She argues that the religious exemption clauses of the statute and regulations "leave[s] no room for those individuals with deeply held moral convictions which must rise to the level of exercise of religion" and that "[t]he primary effect of the exemptions for religious purposes is to advance the protected religion in the eyes of the moral person who desires the exemption on deep-seated grounds, but who is unable to qualify for the exemption by reason of not being a member of the favored religion." Thus, she argues that the religious exemption clauses offend the Free Exercise and Establishment Clauses of the First Amendment by favoring "the protected religion" and also offends the Equal Protection Clause of the Fourteenth Amendment by not protecting as well what she claims to be her "deeply held moral convictions."

In effect her claim is that her beliefs and fears concerning inoculation for rubeola and rubella should be afforded the same protection as traditional religious beliefs and that not to so protect them violates the Religion Clauses of the First

Amendment to the Federal Constitution as well as the Equal Protection Clause of the Fourteenth Amendment and her Right to Privacy thereunder.

We find appellant's arguments untenable. As already noted, appellant's objections to the immunization program in this State are based on her own subjective evaluation of and rejection of the benefits to the public safety and to her children derived therefrom. Her beliefs are based on purely secular considerations; they are philosophical and personal rather than religious. Such beliefs do not rise to the demands of the Religion Clauses. As said by the Supreme Court of the United States in *Wisconsin v. Yoder*, 406 U.S. 205, 215-216 (1972):

> "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; *to have the protection of the Religion Clauses, the claims must be rooted in religious belief.* Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, *the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.* Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. *Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.*" (Emphasis added).

As appellant's claims of denial of equal protection and invasion of privacy are predicated primarily upon the

validity of her Religion Clauses argument, they too are without merit. However, aside from the unavailability of the Religion Clauses of the Federal Constitution and the Maryland Declaration of Rights to afford appellant relief in this case, we think the answer to her equal protection and right to privacy arguments is found in the application to the facts of this case of the following principles set forth in *Jacobson v. Massachusetts, supra*, more than 75 years ago:

> "The defendant insists that his liberty is invaded when the State subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination; that a compulsory vaccination law is unreasonable, arbitrary and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person. *But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint.* There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. *Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy.* Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. *This court has more than once recognized it as a fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State;* of the perfect right of the legislature to do

which no question ever was, or upon acknowledged general principles ever can be made, so far as natural persons are concerned.'" *Id.* at 26. (Emphasis added).

Judgment affirmed; costs to be paid by appellant.

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

BARBARA J. SYSKA, individually
and as guardian of
A. MIESZKO SYSKI
and
BOGUMIL A. SYSKI,

Plaintiff

v. Equity No. 66149

MONTGOMERY COUNTY BOARD OF EDUCATION
and
CHARLES BUCK, Ph.D., Secretary of Department of Health and Mental Hygiene, State of Maryland

Defendants

OPINION AND ORDER

This matter is before the Court on the amended bill of complaint filed by the plaintiff for herself and her two minor sons seeking to declare the compulsory program of immunization of school children in Maryland unconstitutional, and to order the admission of her two sons into schools in Montgomery County, Maryland, without requiring immunization shots for measles (rubeola)

and German measles (rubella).

PROCEDURAL STATUS

On February 14, 1979 plaintiff filed her bill of complaint following the refusal of the school authorities to admit her son, A. Mieszko Syski, to the Kemp Mill Elementary School located in Silver Spring, Maryland, because he did not have the required immunization shots against measles and German measles.

On April 3, 1979 Judge John P. McAuliff, after a hearing held on March 30, 1979, denied a request by the plaintiff for a mandatory interlocutory injunction requiring the School Board to readmit A. Mieszko Syski to the school. On May 18, 1979, the plaintiff amended her bill of complaint to include therein her son, Bogumil A. Syski, who had been denied admission on April 3, 1979 to Good Counsel High School in Silver Spring, Maryland, because he could not submit proof of immunization against measles. Good Counsel is a Catholic high school and not operated by the local Board of Education.

On July 26, 1979 the case came before this Court on plaintiff's motion for summary judgment. By agreement of the parties, the case was tried on its merits and the motion for summary judgment was withdrawn. Testimony was taken over two days, argument was presented, and the matter reserved for decision by this Court.

FACTS

The plaintiff is the mother of six children, the two youngest of whom are the ones involved here, namely Bogumil, age 15, and Mieszko, age 8. Neither child has received immunization for measles or German measles as is required by the regulations of the Department of Health and Mental Hygiene of the State of Maryland. These requlations, cited as COMAR 10.06.04.01 were issued pursuant to the provisions of Article 77, Section 84 of the Annotated Code of Maryland now codified in Education Article Section 7-402, which in general authorizes the Department to promulgate regulations regarding immunizations required of children entering school. The regulation first became effective

January 1, 1973 for kindergarten and first grade children and September 1, 1973 for children in grades two through six.

On December 16, 1977 the regulation was enlarged and became effective to include measles (rubeola) immunization for children in grades seven through twelve. Voluntary compliance was initially attempted but because of abnormal outbreaks in 1976 and 1977, compulsory compliance was initiated as of January 1, 1978.

In March 1978 guidelines for immunization certification of school children from kindergarten through the twelfth grade were prepared by the Maryland Department of Health and Mental Hygiene, Preventive Medicine Administration, Immunization Program. These guidelines were authorized by the Maryland Steering Committee on Immunization of the Medical and Chirurgical Faculty of Maryland as provided in Section .01 of the regulations.

As a result, compulsory immunization is now enforced for a number of diseases including measles and German measles for all school children in Maryland schools, public, parochial and private. The immunizations required for children from kindergarten through grade six, in addition to measles

and German measles, are diphtheria, pertussis (whooping cough), tetanus, and poliomye;itis. For children in grades seven through twelve, the only immunization required is for measles (rubeola). The regulations and the guidelines state that no pupil shall be entitled to enter or remain in school unless he or she has received the prescribed doses of immunization for the above diseases. Two exceptions are provided by the regulations, a statement signed by a physician or by a public health department official certifying a medical contraindication, or a religious exemption statement signed by the parent or guardian. The approved guidelines provide another exception for a lost or destroyed immunization record which must be reconstructed and approved by a physician and a representative of the local health department.

Pursuant to the reequirements of this program, Mieszko was denied admission to the Kemp Mill Elementary School in January of 1979 and Bogumil was denied admission at Good Counsel High School in April of 1979. The plaintiff does not assert a religious exemption nor does she contend that there is a medical contraindication to the immunization of her children. She bases her opposition to compulsory immunization upon

"moral and ethical" grounds which she has considerable difficulty in articulating, as well as upon Constitutional grounds. She appears to have no objections to immunization programs in principle, but maintains opposition to the compulsory features of this particular program as it applies to her children apparently because of fears of side effects and her belief that the program is still experimental in nature.

The evidence prsented by the Department of Health and the Board of Education came from several physicians including Dr. Saul Krugman, a renowned pedriatric physician and expert on measles, German measles, vaccines and immunization programs. His qualifications are unassailable and include a lifetime of research and practice in the field of these diseases as they relate to children and pregnant women. Mrs. Syska herself testified but produced no expert testimony on her behalf. From all the testimony and exhibits presented by the parties, the following facts have been established.

Measles, or rubeola, is characterized as the most serious of common childhood diseases. Side effects include ear infections, pneumonia, encephalitis (inflammation of the brain) and even death, the latter result occurring in about one in every 10,000 cases.

About one in 1000 contract encephalitis.

German measles, or rubella, is likewise a common disease of children usually of short duration and mild effects. Rarely does it induce any serious side effects. However, a pregnant woman contracting measles or German measles, especially the latter, stands a good chance of bearing a cripples or seriously deformed or retarded child.

After the last major rubella epidemic in the United States in 1964, more than 25,000 children were born with serious defects including blindness, deafness, physical deformities, heart problems and mental retardation, all traceable to mothers who contracted rubella during pregnancy. In 1954 the measles virus was isolated and in 1964 the German measles virus was also isolated. Vaccines were then developed to innoculate children against these diseases in an effort to stamp out the illnesses with their attendant disastrous effects on unborn children. About 1963 an approved measles vaccine came on the market, and in 1969 a German measles vaccine was also federally licensed for use on humans. Since that time nearly one hundred million children have received the vaccines, and the use of them has been conclusively established as both safe

and effective. Safety is demonstrated by the fact that over the past several years of administering these vaccines, including eleven years experience with rubella, statistics show that one out of five children receiving the measles vaccine will have a slight rash or low grade fever about one or two weeks later. Approximately one out of seven children receiving German measles vaccine will get a rash or mild swelling of the glands one or two weeks later, usually lasting only two or three days. The incidence of persons contracting the serious side effects of either measles or rubella is so small as to be insignificant, estimated to be of the order of one in one million.

The effectiveness of the vaccines is demonstrated by the fact that there has been no major epidemic of measles or German measles in the United States since 1964 and that prior to that t ime epidemics of major proportions occurred on approximately six to nine year cycles. Medical statistics and experience also indicate the vaccine is approximately 95% effective. Dr. Krugman testified that in the absence of the vaccine it could be expected that about 85% of the population would have contratced either one or both of the diseases before reaching adulthood.

This statistical and factual background clearly established that the use of vaccines has effectively reduced the incidence of measles and rubella over the past decade to the point where cases of the disease are becoming more and more uncommon among children, both immunized and non-immunized. Also, the evidence conclusively establishes that the development of the vaccine is no longer in an experimental stage as that word is traditionally used. Obviously continuing research is being conducted and improvements made as the knowledge increases but this does not convert an effective and safe program, fully tested, into the category of an experimental program.

Despite the rather spectacular success of the use of immunizations, progress has not yet advanced to the stage where the program can safely be discontinued as has been the experience with small pox immunization. The reason is because programs in other countries of the world have not been as successful as ours in the United States. For example, both Great Britain and Israel adopted a strategy of immunizing all women of child bearing age and girls before puberty rather than all school children. According to the experts the difficulty with this approach is that it cannot reach enough of the population to be fully effective. The fact that a major epidemic of measles occur-

red in 1978 in both Great Britain and in Israel may well support this conclusion.

ISSUES

The issues presented by the plaintiff's bill of complaint are the following.

1. Is the compulsory immunization program instituted in Maryland constitutionally defective because it violates the provisions of the First Amendment respecting the establishment of religion and the free exercise thereof,

2. Is the program constitutionally defective because it denies plaintiff the equal protection of the laws under the Fourteenth Amendment, and

3. Does the program violate the Fourteenth Amendment's due process clause as an invasion of privacy of the body?

The defendants assert that the program and the law and regulations upon which it is based do not offend and constitutional rights and guarantees but is a legitimate exercise of the power of the State to protect the health and welfare of a substantial segment of its people, namely school children and pregnant women and their unborn babies.

DISCUSSION *

That the program for immunization against measles and German measles has been an outstanding medical success of significant benefit to the public at large can hardly be disputed. That the plaintiff cannot attack the regulation as an improper exercise of the power of the state to enact legislation governing the health and general welfare of the people of the State is likewise difficult to dispute. Since the plaintiff cannot bring herself or her children within any of the prescribed exceptions, the only issues remaining are those relating to the First and Fourteenth Amendment claims, set out earlier in this review.

The Court has carefully reviewed the arguments of the plaintiff, both oral and written, on these issues and has likewise considered the *(See Appendix for citation of authorities). contentions of the defendants and has concluded that under the governing law and cases, no constitutional guaranty or right reserved to the plaintiff by the First and Fourteenth Amendments to the Constitution of the United S tates has been infringed, nor has Article 36 of the Maryland Declaration of Rights been violated.

The statute and regulations under attack do not constitute a law respecting the establishment of religion, nor do they have the effect of prohibiting the free exercise thereof. On the contrary, they have a secular legislative purpose, and a primary effect neither advancing nor inhibiting religion. In addition the cumulative effect of the law is to limit and avoid excessive government interference with religion.

As to the claims of unequal protection of the law forbidden by the Fourteenth Amendment, the compulsory immunization program as authorized and established by the statute and the regulations does not create unreasonable classifications of persons having no rational basis to support them and which bear no reasonable relation to a permissible governmental objective. Obviously, the legislative effort to prevent the spread of communicable disease with such extreme destructive potential to the health of children and pregnant mothers as measles and German measles, is a legitimate exercise of the legislative authority. The creation of exempt classifications based on medical and religious considerations is reasonable and the classifications created have a rational basis to support them.

The claim of lack of due process under the Fourteenth Amendment is likewise unsupportable.

Without prolonging this discussion, suffice it to say that the contentions of the plaintiff seeking to strike down the compulsory immunization program as unconstitutional are without merit.

ORDER

Accordingly, based on the foregoing facts and statement of law, it it by the Circuit Court for Montgomery County, Maryland, this 13th day of August, 1979

ORDERED, DECLARED AND DECREED that the provisions of Section 7-104 of the Education Article of the Annotated Code of Maryland and the provisions of Title 10, Chapter 4, Sections 01 through 06 of the Code of Maryland Regulations are not unconstitutional as a violation of the First Amendment to the Constitution of the United States of America or Article 36 of the Maryland Declaration of Rights, and it is further

ORDERED, DECLARED AND DECREED that the statute and regulations set forth above are not in violation of the due process or equal protection clauses of the Fourteenth

Amendment to the Constitution of the United States or of the Maryland Declaration of Rights, and it is further

ORDERED and DECREED that the prayers in the original and amended bills of complaint for injunctive relief and counsel fees be and they are hereby denied and the said bills dismissed, each party to pay his or her own costs.

/s/ Philip M. Fairbanks
Judge of the Circuit Court for
Montgomery County, Maryland

IN THE COURT OF
APPEALS OF MARYLAND

BARBARA J. SYSKA, Indiv. etc.	Petition Docket No. 256 September Term, 1980
v.	
MONTGOMERY COUNTY BOARD OF EDUCATION et al	(No. 1023, Sept. Term, 1979 Court of Special Appeals

ORDER FOR APPEAL

Mr. Clerk:

Enter an Appeal to the U. S. Supreme Court on behalf of Barbara J. Syska, Appellant, from the Order of the Court of Appeals of Maryland denying petition for writ of certiorari and entered in this case on October 10, 1980.

James G. Kolb, Esq.
Attorney for Appellant

FILED

JAN 8 1981

James [illegible], Jr., Clerk
Court of Appeals
of Maryland

IN THE COURT OF
APPEALS OF MARYLAND

BARBARA J. SYSKA, Indiv.
etc.

v.

MONTGOMERY COUNTY BOARD
OF EDUCATION ET AL

Petition Docket
No. 256
September Term,
1980

(No. 1023, Sept.
Term, 1979
Court of
Special
Appeals

CERTIFICATE OF SERVICE

I certify that a copy of the forgoing Order for Appeal was deposited in a United States Post Office or mailbox with first-class postage prepaid, addressed to Stephen J. Sfekas, Assistant Attorney General, 201 West Preston Street, Baltimore, Maryland 21201 and Robert Bourbon, Esquire, 30 Courthouse Square, Rockville, Maryland 20850 on this 8th day of January, 1981. All parties required to be served have been served.

James G. Kolb

James G. Kolb, Esquire

BARBARA J. SYSKA, Indiv., etc.

v.

MONTGOMERY COUNTY BOARD OF EDUCATION et al.

In the Court of Appeals of Maryland

Petition Docket No. 256 September Term, 1980 (No. 1023, Sept. Term, 1979 Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: October 10, 1980

80-1192

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BARBARA J. SYSKA, INDIVIDUALLY AND AS GUARDIAN OF A. MIESZKO SYSKI, AND BOGUMIL SYSKI,

Appellant,

V.

MONTGOMERY COUNTY, MARYLAND BOARD OF EDUCATION

AND

SECRETARY OF HEALTH AND MENTAL HYGIENE, STATE OF MARYLAND,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR IN THE ALTERNATIVE, MOTION TO AFFIRM

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OCTOBER TERM, 1980

BARBARA J. SYSKA, INDIVIDUALLY AND AS GUARDIAN OF A. MIESZKO SYSKI, AND BOGUMIL SYSKI,

Appellant,

V.

MONTGOMERY COUNTY, MARYLAND BOARD OF EDUCATION

AND

SECRETARY OF HEALTH AND MENTAL HYGIENE, STATE OF MARYLAND,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR IN THE ALTERNATIVE, MOTION TO AFFIRM

STATEMENT OF THE CASE

Measles and rubella, although considered ordinary childhood diseases, frequently have dangerous consequences. Children afflicted with measles frequently develop pneumonia, serious ear infections, neurological disease, encephalitis, brain damage and even death. Mothers who develop rubella during pregnancy can deliver children with severe birth defects such as mental retarda-

tion, deafness, infantile autism, blindness, cataracts, heart disease and cerebral palsy.

Within the last 20 years, safe and effective vaccines have been developed against both diseases. Immunization programs have prevented millions of cases of measles and rubella and tens of thousands of serious complications.

Md. Ann. Code Ed. Art. § 7-402 and COMAR 10.06.04 establish a system of compulsory immunizations for school children. No child may be admitted to school who has not been immunized against a group of childhood diseases, including measles and rubella. § 7-402(b) and COMAR 10.06.04.03 exempt from compulsory immunization children whose parents or guardian object to immunization on the grounds that immunization conflicts with the tenets of a recognized religion. Children for whom there is a medical contraindication may also be exempted.

A Maryland child may be exempted from immunization by undergoing a blood titre. The titre may be performed by taking a small quantity of blood from a child's finger. Mrs. Syska has refused to have a blood titre performed on either of her children.

A religious exemption may be established by signing a school form declaring that the child belongs to a recognized religion which objects to immunizations.

Mrs. Syska has not claimed exemption on the basis of blood test, religion or medical contraindication.

Mrs. Syska testified that she objected to immunization for her child because immunization was intended to benefit society as a whole rather than to protect her children. (Rubella is a mild disease. The primary purpose for immunizing male children is to prevent the spread of the disease to women of child bearing age. The "American approach" has proved to be more successful than other

types of immunization campaigns in other countries). She believed that the cost-benefit ratio for her sons receiving the vaccine is lower than if he did not receive the vaccine. She further alleged that the vaccines are "experimental" and that as a parent she has the right to grant or deny consent to her children's participation in an experiment.

However, her estimation of the "cost-benefit" ratio is based on her lay understanding of scientific articles and studies. The state legislature and the great body of medical opinion hold that immunizations are an effective public health measure. The vaccines at issue have been licensed for sale for 10 to 20 years and almost 100 million doses each of rubella and measles vaccine have been given. Neither vaccine is considered experimental by the medical community or the federal government.

Although Mrs. Syska has expressed an objection to the immunization of her son Bogumil against measles, she did have her son Miezko immunized against measles when that became necessary for her to get a job.

II.

ARGUMENT

THIS CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

The Plaintiff has based her appeal on three constitutional claims:

a. that compulsory immunization violates the Plaintiff's right to privacy;

b. that the religious exemption of Md. Ann. Code Ed. Art. § 7-402 and COMAR 10.06.04 violates the protections of the First Amendment Religion Clauses;

c. that the exemptions violate the Plaintiff's right to the equal protection of the laws.

None of these arguments presents a substantial federal question. Each of these arguments presents a question so unsubstantial as to need no further argument.

a. The law has been well-settled by this Court that a State has the constitutionally valid power to compel immunizations in order to protect the public health. As long ago as 1905, in *Jacobson v. Massachusetts,* 197 U.S. 11 (1905), the Court sustained a Massachusetts statute compelling immunization. The Supreme Court has consistently followed *Jacobson* in subsequent decisions, *see Zucht v. King,* 206 U.S. 174 (1922), *Roe v. Wade,* 410 U.S. 113, 154 (1973).

The overwhelming majority of cases in other courts have followed *Jacobson* even in the absence of an actual epidemic. *See Kleid v. Board of Education,* 406 F. Supp. 902 (W.D. Ken. 1976); *Wright v. DeWitt School District,* 238 Ark. 906, 385 S.W.2d 644 (1965), *Hartman v. May,* 168 Miss. 477, 151 So. 737 (1934); *Board of Education v. Maas.,* 56 N.J. Super. 245, 152 A.2d 394 (1959), *cert. den.* 363 U.S. 843 (1960), *Maier v. Besser,* 73 Misc. 2d 241, 341 N.Y.S.2d 411 (1972); *Dunham v. Board of Education,* 154 Ohio St. 469, 96 N.E.2d 413 (1951); *Itz v. Penick,* 493 S.W.2d 506 (Tex. Sup. Ct. 1973). *Cf. Prince v. Massachusetts,* 321 U.S. 158 (1944). *See generally,* Annotation 93 A.L.R. 1413 (1934).

The rapidly evolving constitutional right to privacy does not undermine the validity of this line of cases. As this court noted in *Roe v. Wade, supra,* at 143:

> The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that this claim asserted by some *amici* that one has unlimited right to do with one's own body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. *Jacobson v. Massachusetts,* 197 U.S. 11

(1905) (vaccination); *Buck v. Bell*, 274 U.S. 200 (1927) (sterilization).

b. The religious exemption in the Maryland statute is typical of exemptions which frequently appear in State immunization statutes and which courts generally have sustained. *See Wright v. DeWitt School District, supra, Cude v. State*, 237 Ark. 927, 377 S.W.2d 816 (1964); *Board of Education v. Maas, supra*; *Dunham v. Board of Education, supra*; *McCartney v. Austin*, 37 Misc. 2d 525, 298 N.Y.S.2d 26 (1969); *In re: Elwell*, 284 N.Y.S.2d 924 (N.Y. Fam. Ct. 1967); *New Braunfels v. Waldschmidt*, 109 Tex. 302, 207 S.W.2d 303 (1918). *Cf. Wisconsin v. Yoder*, 406 U.S. 205 (1972). *Yoder* established a three part test for analyzing an alleged interference with a person's free exercise of religion.

First, the allegation must rest on religious, not secular grounds. Although the term "religion" should be understood in a broad sense, *see Welsh v. United States*, 398 U.S. 333 (1970), *Seegar v. United States*, 380 U.S. 163 (1965), the First Amendment protects religious values, not secular philosophical values, *see Wisconsin v. Yoder, supra* at 215-16.

Mrs. Syska herself acknowledges that her beliefs as to immunization are philosophical and moral rather than religious.

Second, *Yoder* requires a showing that the State has interfered with religiously motivated conduct. *Id.* at 218-19.

Although the State would concede that such an interference with Mrs. Syska's beliefs would have occurred if her opposition to immunizations were based on religious grounds, the State nevertheless is requiring no more of Mrs. Syska than that she permit her son Miezko to enjoy the same protection from disease that she herself has

already consented to for Bogumil. Thus, any State interference is *de minimis.*

Third, the Court must determine if a compelling State interest outweighs the interference with the person's activities.

Clearly, the State has a compelling interest in preventing the spread of highly communicable dangerous diseases. The State's interest is particularly high when the method used to prevent the spread of disease is safe, effective, and inexpensive. Mrs. Syska's interest by contrast is slight. Her own religion (Roman Catholocism) does not forbid immunization. She has already consented to vaccinations of Miezko against measles and of both children against other diseases. If the two children were immunized they would have a 95% chance of being protected against the respective diseases with an infinitesimal chance of suffering a side effect from the vaccine. Thus, the State's interest in requiring immunization is overwhelming, and Mrs. Syska's interest in avoiding it is trivial.

The Plaintiff has also alleged that the exemption clause creates an establishment of religion in violation of the First Amendment. In *Committee for Public Education v. Nyquist,* 413 U.S. 756 (1973), this Court established a three part test for claims arising under the establishment clause.

To survive challenge, the statute must reflect a clearly secular legislative purpose, must have a primary purpose that neither advances nor inhibits religion, and third, must avoid excessive government entanglement with religion. The Maryland statute meets all three tests.

The prevention of disease by immunization is a clearly secular purpose.

The primary purpose of the statute is to protect public health, not to advance or inhibit religion. What minimal benefit a religious organization with an objection to immunization might receive by the exemption is too attenuated and remote to amount to a constitutional violation.

Finally, Maryland's statute avoids excessive entanglement with religion either administratively or politically. The exemption is established by a declaration that a party belongs to a religion opposing immunizations. The exemption has not been a matter of political controversy.

Indeed this Court has recognized in the past that excessive entanglement can occur from the *failure to exempt religions* from public duties. *See Walz v. Tax Commissioners,* 397 U.S. 664, 674 (1970). The failure to exempt bona fide religious objectors to immunizations from the requirements of the law would force the State to compel conscientious religious groups to violate strongly held religious beliefs. Such compulsion would be far more likely to entangle the State with religion both administratively and politically then would the exemption of such groups from the laws.

c. The Plaintiff's argument that the religious exemption violates the equal protection of the Fourteenth Amendment is unsubstantial. The exemption does not rest on a suspect classification. As Mrs. Syska's First Amendment rights have not been infringed, fundamental rights have not been affected. Thus, the State need only show that the statute bears a rational relationship to the attainment of a permissible state goal. *Railway Express Agency v. New York,* 336 U.S. 106 (1940).

Maryland law permits the immunization of as many children as possible while at the same time not intruding upon conscientiously held religious beliefs. On the other

hand, the law permits the state to act decisively to immunize even objectors when epidemic conditions develop. Therefore the law is rationally related to the State purpose of protecting the public health against communicable disease.

CONCLUSION

The appeal should be dismissed or in the alternative, the case should be affirmed.

Respectfully submitted,

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